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Diplomatic restraint and a lack of protection in the ECJ Shepherd C-472/13 case

ANUSCHEH FARAHAT — 6 March, 2015

Last week, the Court of Justice of the EU delivered its judgment on an unusual asylum case. It had to decide whether and under what conditions non-combat military personnel fearing to become involved in the commission of war crimes could claim refugee status under the EU Qualification Directive (QD). Valentin Jeutner has already presented the facts of the case and a first assessment of the judgment, in which he stressed the strong legalistic approach of the court. I agree with his preliminary

observations. However, I would like to add a few remarks on three problematic aspects of the judgment.

The first aspect concerns the relevant standard for proving the "likelihood" of being involved in the commission of war crimes. Not only does the Court reveal a very legalistic approach by suggesting that existence of legislation penalizing war crimes renders their commission "implausible" (para. 42). But the Court also draws severe procedural consequences from the existence of such legislation. In such case, the burden of proving that it is "highly likely that [war crimes] will be committed" (para. 43) is with the applicant. Obviously, this will be hard to prove. Moreover, the Court does not apply a consistent standard throughout the judgment: While it initially only requires that participation in the commission of war crimes must be "reasonably plausible" (para. 38), it later requires a "high likelihood". More importantly, the standard of "high likelihood" does not correspond to the standard normally required in international and European refugee law. As expressed in Article 2 (f) of the revised QD (2011/95/EU) an applicant is to be recognized as a refugee if he or she faces a "real risk" of being prosecuted for one of the relevant reasons. To require a "high likelihood" is incompatible with this standard. The Court therefore significantly raises the required standard for military personnel refusing to perform their service.

Interpreting the facts of the case instead of EU law

On a methodological level, the Court blurs the line between interpretation of EU law, which is its genuine task, and the application of that law to the concrete case, which clearly is not its task. Here, the Court does not refrain from

pronouncing itself on the interpretation of the facts of the concrete case. To the contrary, by suggesting that the facts do not support the argument of a disproportionate or discriminatory persecution in the sense of Article 9(2)(b) and (c) QD, the Court gets involved in the interpretation of the facts and tries to control the outcome of the concrete case (paras. 47–56). After having gone so much into the details and the concrete solution of the case, the Court adds a fig leaf: "It is, however, for the national authorities to ascertain whether" the sentence faced by Mr. Shepherd is disproportionate and discriminatory or not (para. 56).

Similarly, where the Court refers to the applicant's voluntary enlistment in the armed forces and his voluntary re-enlistment after his first period in Iraq, it not only establishes a criterion, but clearly suggests how the national authorities have to weigh this fact in the case at hand. The Court ignores the fact that Mr. Shepherd had argued that he had only re-enlisted because he was promised not to be send to Iraq again. Moreover, the Court decides that an applicant may only successfully apply for a refugee status if he or she has sought recognition as a conscientious objector, where such a procedure is available (paras. 44 and 45). Mr. Shepherd argued that in his case recognition as a conscientious objector would be unsuccessful, because he did not completely reject the use of force and war, but only feared to contribute to the commission of war crimes. By requiring that an applicant has to first seek recognition as a conscientious objector anyway, the Court develops an extremely high burden of proof, which may almost never be met by any soldier from a "Western" country, and certainly not by Mr. Shepherd.

Ignorance or naivety? The misconception of the concept of legitimate use of force

By holding that a mandate of the UN Security Council or "a consensus on the part of the international community" offer "every guarantee that no war crimes will be committed." (para. 41) the Court reveals a fundamental misunderstanding of the concept of legitimate use of force under international law. Under the UN Charter, a mandate of the Security Council legitimizes the use of force as an exception to the general prohibition of the use of force under international law. That's it! The legitimizing force of the mandate ends here. Such a mandate does not imply any statement on the way in which the military action is performed. Of course, war crimes are forbidden in military actions covered by a mandate of the UN Security Council, but so are they in any other military conflict. It remains entirely unclear why and how a UN mandate should guarantee that no war crimes are committed during an armed conflict. Such an assumption is only plausible if you believe that the letter of the law determines reality. But then why check political measures at all?

Moreover, the Court does not only miraculously extend the legitimizing effect of a UN mandate but also ascribes such an effect to any military operation which is based on an "international consensus." It remains unclear what the Court means by this. Does it mean no war crimes are to be expected when "we and our Western friends" agree to go to war? Does it imply that the war in Iraq was based on such a consensus? It clearly was not. At the time, many countries from all regions of the world criticized the invasion of Iraq as unlawful, and the Security Council initially refused to give a clear mandate to the "coalition of the willing." And finally:

how does the Court come from an obscure "international consensus" to the legal effect of jacking up the burden of proof to a potential refugee?

Finally, the Court not only seems to tremendously overestimate the authority of the UN Security Council, it also puts an extraordinary amount of confidence in this institution. Against the background of the *Kadi* jurisprudence, one may argue that the Court intentionally signaled that it acknowledges decisions of other international institutions within the European legal order. If this is the case, it failed to do so convincingly, because it fundamentally misunderstood the legal effect and logic of a UN mandate. I think it is more likely that the Court simply wants to trust UN sanctioned military actions for purely political and diplomatic reasons. The case of Mr. Shepherd vividly illustrates how inappropriate such a diplomatic approach is in the context of refugee protection. The idea of trust may already be a delicate one in internal European affairs (see here and here), but it becomes dangerous if applied with regard to the way in which military operations are conducted.

This holds particularly true when the protection of refugees is concerned: The protection of refugees needs to operate on an individual basis, where the individual applicant always retains a realistic option to prove that he needs to be protected. In the case of Mr. Shepherd, this has become a rather theoretical option.

A glimpse of hope: The floor is open

Does the Court not do any good in this case? Only a cautious answer to this question seems appropriate. The Court made

it very clear that EU asylum law is in principle applicable to all military personnel. Given the increasing number of military conflicts around the world and the many armed conflicts that are not covered by a UN mandate, it is indeed possible that the Court opened the door to asylum for a new group of applicants in the future. The war between Russia and the Ukraine might become a first case where this new approach may be applied with different results than in the case of Mr. Shepherd. The floor is open for new cases.

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